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THE UNIVERSITY OF PENNSYLVANIA LAW REVIEW announces the election of its officers for next year, as follows:

MR. W. JAMES MACINTOSH, *Editor-in-Chief;*
MR. HAROLD C. ROBERTS, *Case Editor;*
MR. THOMAS B. K. RINGE, *Business Manager.*

This number has been prepared under the supervision of the new officers.

NOTES.

LEVY AND ATTACHMENT UPON STOCK CERTIFICATES.—Corporate stock is regarded by the law as personal property of the stockholder, in the nature of a chose in action. At common law, it, like other choses in action, could not be reached by process of levy or attachment.[1] Now, however, almost everywhere, statutes authorize levy upon and attachment of stock.[2] Consequently there is at the present time practically no question that stock may be attached or levied upon as property of the stockholder, under proper statutory procedure and in the proper place. But the question of what is a proper place—what stock may be attached or levied upon in a particular jurisdiction, or what jurisdiction can levy upon or attach certain stock—has not been satisfactorily answered in all of its aspects. The cases in which this problem is involved are most frequently cases construing federal or state statutes governing execution, garnishment, or foreign attachment. Although these cases are necessarily affected by the wording of the particular statute in question, they are decided largely on general principles as to the nature and *situs* of corporate stock,[3] and therefore may properly be considered in this discussion.

It was settled without any great difficulty that under these statutes, stock could be attached or levied upon by process served on the corporation at its domicile, regardless of the location of the stock certificates or of the residence of the owner.[4] Thus, under foreign attachment statutes, attachment of the stock at the domicile of the corporation is effectual to give the court jurisdiction of the non-resident owner upon whom personal service cannot be obtained.[5] The stock is regarded as property having a *situs* at the domicile of the corporation, and, therefore, subject to process there. Most cases apply this principle exclusively to corporations incorporated within the jurisdiction, but a few have extended it to permit process against stock of foreign corporations which, however, have their main office or do their main business within the jurisdiction.[6] But the courts which

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[1] Denton v. Livingston, 9 Johns. 96 (N. Y., 1812); Fowler v. Dickson, 1 Boyce 113, 74 Atl. 601 (Del., 1909).

[2] See Cook, Corporations, (8th ed.) sec. 482; Fletcher, Corporations, sec. 3140.

[3] *E. g.*, Statutes authorizing attachment of corporate stock are, because of the courts' view as to the nature and *situs* of stock in general, construed as applicable to stock of domestic corporations only.

[4] Jellenik v. Huron Copper Mining Co., 177 U. S. 1 (1899); Barber v. Morgan, 84 Conn. 618, 80 Atl. 791 (1911); Hook v. Hoffman, 16 Ariz. 540, 147 Pac. 722 (1915).

[5] Cases cited in note 4, *supra*.

[6] Bowman v. Breyfogle, 145 Ky. 443, 140 S. W. 694 (1911); Dean Tel. Co. v. Howell, 162 Mo. App. 100, 144 S. W. 135 (1911). *Contra:* Ashley v. Quintard, 90 Fed. 84 (C. C., 1898).

permit this do so on the ground that the corporation is in reality domiciled in the jurisdiction;[7] thus they extend the doctrine, but do not really break in upon it.

When, however, efforts were made to obtain a levy or an attachment, not by process on the corporation at its domicile, but by seizure of the certificates of stock present in a state[8] other than the domicile of the corporation, serious difficulty arose. The courts that have considered the validity of such a levy or attachment have reached results that have differed with the differing views of the various courts in regard to the real nature of a stock certificate.

The older and classic conception of a stock certificate, as was once the case in regard to negotiable instruments in the eyes of the common law, is that it is but a muniment of title, having no value in itself except as evidence of the ownership of a right.[9] Under this view it could not be deemed to be property, and consequently it could have no *situs* as property. Entirely consistent with this view then, are the cases which hold that the state in which certificates of stock of a foreign corporation are located has not, by reason of the presence of the certificates, any property within its borders upon which levy or attachment can operate, and that in the very nature of things, the statutes cannot change this situation. In one of the cases it is said that there could be no more basis for a levy or attachment of the stock by seizure of the certificates, than there could be for a levy on real estate in another state by seizure of the title deeds.[10] This has been the attitude of the great majority of courts.[11] Mr. Cook states the doctrine of the cases to be that the *situs* of stock for purposes of attachment, garnishment, and execution is at the domicile of the corporation and nowhere else.[12]

But is all this consistent with the practical status of stock certificates in modern life? It is certainly not the popular or business concept. Stock certificates are owned and handled by thousands of persons every day, but very few of these persons think of their certificates as mere evidence; they consider them as property and deal with them as such. True, the certificates are not the shares; the

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[7] Wait v. Kern River Mining Co., 157 Cal. 16, 106 Pac. 98 (1909).

[8] Since most of the cases are ones arising in the United States, the term "state" will be here used as synonymous with "jurisdiction," thus including within its meaning any foreign jurisdiction.

[9] Christmas v. Biddle, 13 Pa. 223 (1850); Winslow v. Fletcher, 53 Conn. 390, 4 Atl. 250 (1885); O. L. Packard Co. v. Laev, 100 Wis. 644, 76 N. W. 576 (1898).

[10] Christmas v. Biddle, *supra*, note 9.

[11] Christmas v. Biddle, *supra*, note 9; Plimpton v. Bigelow, 93 N. Y. 592 (1883); Winslow v. Fletcher, *supra*, note 9; Smith v. Downey, 8 Ind. App. 179, 35 N. E. 568 (1893); Ireland v. Globe Milling Co., 19 R. I. 180, 32 Atl. 921 (1895).

[12] Cook, Corporations, (8th ed.) sec. 485.

shares would exist though the certificate were destroyed. But in ninety-nine situations out of a hundred, he who owns the certificate owns the shares; he who controls the certificate controls the shares. There is fully as close a relation between the certificate and the shares as there is between a negotiable bill of lading and the goods shipped under it. And the law distinctly treats the bill of lading as representing the goods, as controlling the title.[13]

The Uniform Stock Transfer Act[14] emphasizes this practical situation in its provision that a *bona fide* holder for value of the stock certificate is entitled to the stock, even if a prior transfer of the shares has been rescinded or set aside;[15] and also in its provision that no levy or attachment of stock for which a certificate is outstanding shall be valid until such certificate be actually seized or surrendered, or until its transfer has been enjoined.[16]

Judge Thayer, of the United States Circuit Court of Appeals of the Eighth Circuit, has summed up the situation as follows: "Speaking technically, it is true that a stock certificate is written evidence of a certain interest in corporate property. The same may be said of notes and bills. They are simply evidence of indebtedness on the part of the individuals or corporations who issue them. But in the business world such obligations or securities are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels, they may be hypothecated or pledged, they have an inherent market value, and while differing in some respects from chattels, they are generally classified as personal property."[17]

If this is the true status of stock certificates today, one might well expect to find a changing attitude among the courts, moving toward a view which would more nearly coincide with the practical situation. If the certificates are property, they should be subject to the same burdens as other property, in the way of levy and attachment, provided, of course, there is a statute of the jurisdiction making corporate stock subject to such process. And furthermore, such a levy should be recognized as a levy on the stock itself, and a sale under the levy should pass title to the stock.

This view is taken by a few courts. One of the earliest cases in which it is applied is a Minnesota decision, in which the court said,—"We ought not . . . to announce any doctrine which will permit a person to bring within our borders certificates of stock in

[13] See, 39 U. S. STAT. AT L. 542; Uniform Bills of Lading Act, sec. 24 (enacted in 24 states); Brimberg v. Hartenfeld Bag Co., 89 N. J. Eq. 425, 429, 105 Atl. 68, 69 (1918).

[14] Enacted in 17 states. See, Tyler v. Dane County, 289 Fed. 843, 851 (D. C., 1923).

[15] Sec. 8.

[16] Sec. 13.

[17] Merritt v. American Steel Barge Co., 79 Fed. 228 (C. C. A., 1897).

a foreign corporation, sell or hypothecate them, to treat them as personal property when seeking redress in our courts for an unlawful interference with or appropriation of the same, and then to insist that they are not within our statute which provides that 'property' shall be subject to garnishment, or within our statutes relating to the seizure of property by virtue of writs of attachment or execution." [18]

The New York courts have been particularly outspoken in supporting this view, and *Simpson v. Jersey City Contracting Co.* [19] is cited as the leading case on the subject. A number of decisions in the lower federal courts [20] take the same position, and the United States Supreme Court several years ago, expressly sustained a levy on stock effected by mere seizure of the certificates,[21] although in that case the stock was that of a domestic corporation.

It is to be noted that all of these cases have arisen simply on the question of the validity of the levy or attachment under the law of the jurisdiction in which such action was attempted. The courts which adhered to the older attitude construed their statutes which authorized levy, attachment, or garnishment of "property" within the state, or of corporate stock, as being applicable to stock of domestic corporations only. Those that have taken the newer view simply construe their statutes to include the stock of foreign corporations as property within the state, if the certificates are there. But they decide nothing in regard to the efficacy of such a levy or attachment to affect the stock at the domicile of the corporation, and it is not for a moment suggested that the new view establishes an exclusive *situs* for levy and attachment at the place where the certificates are. There is no attempt to displace the well-settled theory of the *situs* of stock at the domicile of the corporation. The new view is merely to recognize, for certain purposes, an additional *situs*.

To the situation of a double *situs* thus created, and to the cases creating it, the objection is made that there is created but an empty right in a person who purchases stock certificates at a sale under such a levy or attachment, or who otherwise lawfully acquires them thereunder.[22] It is argued that even if the courts of a state do de-

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[18] Puget Sound Nat. Bank v. Mather, 60 Minn. 362, 62 N. W. 396 (1895).

[19] 165 N. Y. 193, 58 N. E. 896 (1900). Also, Wynn v. Grifenhagen, 167 App. Div. 572 (N. Y., 1915); Gen. Motors Corp'n v. Ver Linden, 199 App. Div. 375, 192 N. Y. Supp. 28 (1922).

[20] Merritt v. American Steel Barge Co., *supra*, note 17; Blake v. Foreman Bros. Co., 218 Fed. 264 (D. C., 1914); Beal v. Carpenter, 235 Fed. 273 (C. C. A., 1916); Mitchell v. Leland Co., 246 Fed. 103 (C. C. A., 1917). See, De Ganay v. Lederer, 250 U. S. 376 (1919), (a tax case).

There are dicta to the contrary, however, in a number of federal cases, *e. g.*, Jellenik v. Huron Copper Mining Co., *supra*, note 4; Miller v. Kaliwerke, etc., Gesellschaft, 283 Fed. 746 (C. C. A., 1922).

[21] Yazoo & Mississippi Valley R. R. Co. v. Clarksdale, 257 U. S. 10 (1921).

[22] See Winslow v. Fletcher, *supra*, note 11.

clare that the levy or attachment was valid and that title passed to the purchaser thereunder, the corporation, domiciled in another state, would not be bound to transfer the shares to him on its books, or to allow him to participate as a stockholder in its affairs, or to pay him dividends,—all rights which must be enforced in the state of the corporation's domicile.[23] And it has been said that the courts of the state where the corporation is domiciled would be doing all they would be bound to do under the full faith and credit clause of the federal Constitution if they recognized that title to certain pieces of paper,—*i. e.*, the certificates,—had passed to the purchaser.

The case of *Bank für Handel und Industrie v. United States Steel Corporation, et al.*,[24] recently decided in the United States Supreme Court, provides a partial, if not a complete answer to this objection. The case involved the title to certain stock of the U. S. Steel Corporation (a New Jersey corporation) which was owned by German banks at the outbreak of the World War. The certificates, indorsed in blank, were at that time in England, some pledged as collateral, and some in possession of London branches of the German banks. The British Public Trustee seized these certificates as alien property, and by virtue of English law they became vested in him. The German banks had never been registered as owners of the stock on the books of the corporation, they having received the certificates indorsed in blank. In the present case, therefore, the banks sought a decree that they be registered as owners and that the outstanding certificates be cancelled by the corporation. It was their contention that the seizure and vesting of the certificates in England could not affect the title to the shares in America, and that to refuse the relief sought would be to deprive them of property without due process of law. The Court, however, dismissed their claims and decreed that the British Public Trustee was entitled to registration as owner. The gist of the decision is found in the following extract from the opinion of the Court:

"Therefore, New Jersey having authorized this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognizes as owner anyone to whom the person declared by the paper to be the owner has transferred it by the indorsement provided for wherever it takes place. It allows an

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[23] *Cf.* Travis v. Knox Terpezone Co., 215 N. Y. 259, 109 N. E. 250 (1915), as to the power of a court to compel a foreign corporation to transfer shares on its books.

[24] 45 Sup. Ct. 207 (1925), affirming decree of District Court, reported in 300 Fed. 741 (1924). The case of Direction der Disconto-Gesellschaft v. the same defendants was decided with the same opinion. *Cf.*, Mitchell v. Leland, *supra*, note 20, in which a purchaser of certificates at a judicial sale was denied relief, but solely on the ground that he had not come into equity with clean hands.

indorsement in blank, and by its law as well as by the law of England an indorsement in blank authorizes anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books. But the question of who is the owner of the paper depends upon the law of the place where the paper is. It does not depend upon the holder's having given value or taking without notice of outstanding claims but upon the things done being sufficient by the law of the place to transfer title. An execution locally valid is as effectual as an ordinary purchase. *Yazoo & Mississippi Valley R. R. Co. v. Clarksdale,* 257 U. S. 10. The things done in England transferred the title to the Public Trustee by English law."

That this decision answers the above objection to the principles of the preceding cases taking the newer view in so far as certificates indorsed in blank are concerned is obvious. If the acts done in respect to the certificates pass title to them by the law of the jurisdiction where they are, *e. g.,* by legal execution or seizure, such acts will be recognized by the courts of the domicile of the corporation as entitling the holder in whom title so vested to registration as owner on the books of the corporation.

It would seem, however, that the principle of this decision is equally applicable to cases where the certificates seized are not indorsed in blank. Validity of the transfer of title by the law of the jurisdiction in which the transfer—by seizure, execution, or attachment—takes place, is made the test of the transferee's right to assert his ownership of the shares at the domicile of the corporation. And certainly good title to the certificates may be given in such proceedings without their being indorsed in blank.[25]

Thus, in the federal courts at least, a complete chain of rights has now been worked out on the modern and practical principles in respect to stock certificates. Prior cases recognized the validity of levies and attachments on certificates under local law; and the present decision of the Supreme Court establishes the rights of holders who take title under such a levy or attachment to have effect given to the title so acquired, as rights in the shares, at the domicile of the corporation.

Application of the principle of the *Bank für Handel* case will undoubtedly give rise some day to a contest between conflicting rights acquired against the stock in two jurisdictions—the jurisdiction having the certificates and the jurisdiction of the domicile of the corporation. This difficulty will have to be settled by the courts of the latter

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[25] See, Gen. Motors Corp'n v. Ver Linden, *supra,* note 19. The Court there says, "The code provisions do not require that the shares of stock of the defendant in a corporation shall be indorsed, and the ease with which the defendant's property interest may be liquidated, has to my mind, nothing to do with the attachability of such interest." See also, Yazoo & Miss. Valley R. R. Co. v. Clarksdale, *supra,* note 21.

jurisdiction. As yet the question has not been passed upon. It was raised in *Miller v. Kaliwerke, etc., Gesellschaft*,[26] but as the claimant having the certificates had failed to assert his rights in the way specifically provided for the purpose, he lost on that ground, and the question of the conflict of rights was not considered on its merits. And in the *Bank für Handel* case, the question would have been squarely raised if the United States Alien Property Custodian had also claimed the stock by seizure at the domicile of the corporation. But as he had asserted no claim, the Court expressly refused to consider the consequences of the possible conflict. This problem then must remain for future solution. But the presence of this unsolved problem should not deter other courts from following the Supreme Court as far as it has gone in recognizing the practical status of stock and stock certificates as the basis for their legal status.

H. C. A.

LIABILITY OF PROPERTY OWNERS FOR INJURY TO PERSONS ENTERING THE PROPERTY IN AID OF ANOTHER.—The liability of a property owner for the injury of a person coming upon his property in the aid of another person already injured or in danger of injury has been brought up again in a recent case in New York.[1] In that case the janitress of the defendant's apartment house fell through a trapdoor left open in a darkened hallway. The female plaintiff, responding to her cries for help, rushed into the building and fell through the same opening. Upon suit by her husband and herself the defense was made that she had been guilty of contributory negligence in rushing into the hallway without pausing until her eyes might become accustomed to the darkness. The trial court adopted this view and instructed the jury that the plaintiff had as a matter of law been guilty of contributory negligence. The Appellate Division, however, finding that the owner was responsible for injuries received by the plaintiff while aiding another negligently injured by him, held that on the facts she could not be charged with contributory negligence as a matter of law, but that that fact would have to be determined by the jury.

The case follows a line of decisions in which an action for damages has been allowed a rescuer for injuries sustained in an effort to save a person injured or in danger of injury by reason of the defendant's negligent conduct. The theory is that his injury is a proximate result of the defendant's negligence toward the first party injured. Such an injury, although sustained by one not the person to whom the original duty of care extended but a third party, is a real possi-

[26] *Supra*, note 20.

[1] Laufer v. Shapiro, 206 N. Y. Supp. 189 (1924).

bility, and one which in many situations can be foreseen as a probable result of the original negligent conduct. The truth of this cannot be shown more clearly than by the words of Cardozo, *J.*, in *Wagner v. International Railway Co.*:[2] "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer. The state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent that plunges to its aid. The railroad company whose train approaches without signal is a wrongdoer toward the traveller surprised between the rails, but a wrongdoer also to the bystander who drags him from the path."

Whether a recovery on this theory necessarily means that there was any duty of care toward the rescuer himself independently of that existing toward the party first injured is beyond the scope of this note.[3] But the authorities allowing a recovery on this basis are numerous, and clearly indicate that this is the law in New York and elsewhere.[4]

In such a situation the plaintiff has been forced to think and act quickly, without time for such full realization of the attendant risks or the exercise of such care as the ordinary rules of contributory negligence would require. Much more latitude must therefore be given in what he will be permitted to do without becoming affected with contributory negligence. Little more can be required than that it shall have appeared to him that he had a fair chance to perform the rescue attempted without at the same time sacrificing himself. The usual requirement is simply that under the circumstances his

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[2] 232 N. Y. 176, 180 (1921).

[3] As to the cognate question of liability toward one who, not in danger of physical injury himself, is injured by the sight of the negligent injury of another see: "Damages for Injury from Fright at the Sight of Another's Peril," 73 U. OF P. L. REV. 280 (Mar., 1925).

[4] Eckert v. Long Island R. R. Co., 43 N. Y. 502 (1872); Donahoe v. Wabash, etc., R. R., 83 Mo. 560 (1884); Spooner v. D. L. & W. R. R., 115 N. Y. 22, 21 N. E. 696 (1889); Condiff v. K. C., etc., R. R. Co., 45 Kans. 256, 25 Pac. 562 (1891); Pennsylvania Co. v. Langendorf, 48 Ohio 316, 28 N. E. 172 (1891); Gibney v. State, 137 N. Y. 1, 33 N. E. 142 (1893); Fox v. Oakland Consolidated St. Ry. Co., 118 Cal. 55, 50 Pac. 25 (1897); Maryland Steel Co. v. Marney, 88 Md. 482, 42 Atl. 60 (1898); West Chicago St. Ry. Co. v. Liderman, 187 Ill. 463, 58 N. E. 367 (1900); Corbin v. City of Philadelphia, 195 Pa. 461, 45 Atl. 1070 (1900); Mobile & Ohio R. R. Co. v. Ridley, 114 Tenn. 727, 86 S. W. 606 (1905); Miller v. Union Ry. Co., 191 N. Y. 77, 83 N. E. 583 (1908), *semble;* Perpich v. Leetonia Mining Co., 118 Minn. 508, 137 N. W. 12 (1912); Bond v. B. & O. R. R. Co., 82 W. Va. 557, 96 S. E. 932 (1918); Wichita Falls Traction Co. v. Hibbs, 211 S. W. 287 (Tex. Civ. App., 1919); Wagner v. International Ry. Co., 232 N. Y. 176, 133 N. E. 437 (1921). See 49 L. R. A. 715, note, and 27 L. R. A. (N. S.) 1069, note.

act would not have appeared rash to prudent persons.[5] And this is not altered by the fact that a sufficient time elapsed between the first accident and the rescue for the rescuer to realize in some degree the nature and extent of the risk he was taking. "It is enough that the act, whether impulsive or deliberate, is the child of the occasion."[6]

But what will be the decision where the owner of the property on which the injury occurred has not been responsible for the harm to the party first injured? There can be no recovery for the injury to the would-be rescuer on the theory discussed above, for that is dependent on the defendant's precedent negligence.[7] But an action may possibly be had on another basis, where the negligence of the defendant consists in maintaining the normal entrances to his property in a condition dangerous to persons rightfully using them. This is based on analogy to the cases allowing a recovery to policemen and firemen who have entered the property in the course of their duty and have been injured due to some fault of the landowner.

The vast majority of the cases term firemen, policemen, etc., entering the property by virtue of a right independent of the invitation or consent of the owner "licensees," and find no liability to them if they fall down elevator shafts, off roofs, etc., in the course of their duty.[8] But more recently it has been pointed out that a public officer enters the property no more by virtue of the owner's consent than by virtue of his invitation, so that he cannot be designated properly by that term. As put by Professor Francis H. Bohlen:[9] "If the public officer is not an 'invitee' because his right to enter does not depend on an invitation extended to him and because he enters, even if summoned by the owner, in performance of his duty as public officer and not in acceptance of the invitation, it is equally clear that he is not a 'licensee' of the owner, since his entry is no more referable to a permission than to an invitation. Such an officer may be entitled to the same, or to a less or greater protection than a 'licensee' has the right to demand, but the measure of care owing to him cannot be satisfactorily determined by calling him a 'licensee,'

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[5] Eckert v. Long Island R. R. Co., *supra*, note 4, at p. 506. "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons." See, in accord, the cases cited *supra*, note 4, and also Linnehan v. Sampson, 126 Mass. 506 (1879); Pennsylvania Co. v. Roney, 89 Ind. 453 (1883); Beach, Contributory Negligence, 3d Ed., sec. 42.

[6] Wagner v. International Railway, *supra*, note 4, at p. 181. See Da Rin v. Casualty Co., 41 Mont. 175, 108 Pac. 649 (1910).

[7] Evansville & C. R. R. Co. v. Hiatt, 17 Ind. 102 (1861); Corbin v. Philadelphia, *supra*, note 4. See 19 A. L. R. 4, 11.

[8] 13 A. L. R. 637, note, and cases there cited; Bohlen, Cases on Torts, 429, note.

[9] "The Duty of a Landlord Toward Those Entering His Premises of Their Own Right," 69 U. of P. Law. Rev. 142, 237, 340, at page 344.

after elaborately and conclusively demonstrating that his right does not depend on the owner's consent, upon which the status of 'licensee' depends as fully as that of 'business invitee'." [10]

It is on this principle that the leading case of *Meiers v. Fred Koch Brewing Co.*[11] is based. There it is decided that, since the officer is there lawfully, he has the right to expect that the means of entrance, designated as such to the owner's business invitees, will be in a condition fit for use by him in the same manner as by them.[12]

And when an individual (there being no intimation of officious meddling) is performing a duty ordinarily performed by a public official or one of a similar nature, the duty of the landowner should be the same toward him as it would be toward the official if he were performing the duty.[13]

That these two bases of recovery are fundamentally distinct cannot be doubted; the one arises primarily from the breach of a duty to the person first injured; the other is based entirely on the breach of a duty toward the rescuer. The paramount right of the rescuer to enter and aid is entirely independent of the cause of injury to the party to be rescued and the negligence of the owner of the property in connection with it. A fireman enters to put out a fire irrespective of the cause, and the duty that the entrances be free from dangerous traps must be the same in either case. The interne on the ambulance knows nothing of the cause of the injury to the party he seeks, and the duty toward him will not vary therewith. But an action by a rescuer on the theory that his injury is a proximate result of the owner's negligence toward the party first injured is based upon a ground of recovery much more narrow in this respect, for it limits itself to those instances where there has been actual fault on the part of the landowner.[14] On the other hand, it is not, as is the former theory, limited to situations arising out of a negligent maintenance of the approaches to a property but applies to all forms of negligence,

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[10] See also, taking the same position, Prof. Leon Green, "Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort." 21 MICH. L. REV. 495 (Mar., 1923).

[11] 229 N. Y. 10, 127 N. E. 491 (1920).

[12] The Koch case is not on its facts contra to the cases referred to *supra*, note 8, with the possible exception of Burroughs Adding Machine Co. v. Fryar, 132 Tenn. 612, 179 S. W. 127 (1915), if its doctrine is limited, as is suggested by Prof. Bohlen, 69 U. P. L. REV. 350 *et seq.*, to injuries arising from the defective maintenance of the prepared approaches and entrances to a property, for there the owner has reason to expect a use by outsiders, as is not true as to the interior portions. In the last analysis the leading case of Learoyd v. Godfrey, 138 Mass. 315 (1885), seems to be entirely in accord with this.

[13] *Supra*, note 9, at page 343. In Kohn v. Lovett, 44 Ga. 251 (1871), and Gramlich v. Wurst, 86 Pa. 74 (1878), recovery for injuries for civilian rescuers were denied on the same reasoning as it was denied to officials, the injuries having been sustained in the interior parts of the properties.

[14] *Supra*, note 7.

to which the former theory could not extend. And there is another difference in respect to the time of the attempt to aid. Where the theory is that of proximate result the attempt to aid must necessarily occur relatively soon after the first injury, but where action is on the theory of the property owner's duty to all persons on his property as of right, there would seem to be no limit on the time within which the attempt and injury must occur. The amount of care required of the rescuer must under either theory vary with the facts in each case and depend on the apparent need for immediate action on his part.

The two problems are entirely distinct, and, although the law of New York allows a recovery in both situations, the instant case and the line of cases on which it is based are not authorities for the other principle. Anything that may be said for or against the general duties of a landowner to a person entering the land in aid of an injured person thereon, or for any other public purpose, cannot be taken to oppose or criticize the theory on which recoveries may be allowed for injuries which are in the particular cases proximate results of the landowner's original negligence. Nor can a limitation placed upon an action based upon the proximate result of previous negligence be regarded as an infringement on the doctrines laid down as to the right of entering rescuers in general.[15]

E. E. M., Jr.

SEARCH AND SEIZURE WITHOUT A WARRANT.—The Fourth Amendment to the Federal Constitution[1]: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."—"is nothing more or less than a declaration of the English common law as it existed or was presumed to exist at the time of the adoption of that instrument."[2] For about seventy years prior to 1763 the practice had been general in England of issuing "general warrants," which authorized the officers of the Crown to search all suspected places and seize all

[15] The fact that these problems are separate and independent appears to have been overlooked by the learned author of the note on the instant case in 34 YALE L. J. 330 (Jan., 1925).

[1] The Fourth Amendment is a restriction on the powers of the Federal Government. Barron v. Mayor, etc., of Baltimore, 7 Pet. 243 (U. S., 1833). Almost every state in the United States has the same or a substantially similar provision in the state constitution. The states and the sections of their constitutions are listed in 34 HARV. L. REV. 366.

[2] Arbitrary Searches and Seizures as Applied to Modern Industry, A. A. Bruce, 18 Green Bag 273.

suspected persons. These warrants were used by the King and his officials to suppress seditious libels, to hunt out the perpetrators of the libels, and secure the means for convicting them by obtaining their letters and other private papers. These general warrants were declared illegal in the case of *John Wilkes, Esq., v. Robert Wood, Esq.*,[3] and a search warrant to search for private papers was declared illegal by Lord Camden in the case of *John Entick v. Nathan Carrington and Three Other Messengers in Ordinary to the King.*[4] At about the same time, the "Writs of Assistance" were used in the colony of Massachusetts Bay to enforce the revenue laws and seize smuggled goods in any suspected place, and aroused general opposition and irritation among the colonists.[5] These occurrences led to the insertion in the Federal Bill of Rights of the provisions contained in the Fourth Amendment.

It is significant that the amendment is in two parts: one part providing immunity from "unreasonable searches and seizures," and the other part providing for special warrants and prohibiting general (John Doe) warrants. The right to arrest, without a warrant, as it existed at common law, has been held to be not unreasonable.[6] The right to search the body of a person legally arrested, for weapons and the means of committing crime, without a warrant, has been sustained, as not unreasonable.[7] The search of persons entering the country, including home-coming citizens, without warrant, has been sustained on the theory of national self-protection.[8] These several examples illustrate that not every search and seizure without a warrant is prohibited and when so made may not be unreasonable.

The same Congress, which formulated and submitted the first ten amendments to the states for approval, passed an act to regulate the collection of customs duties. This act provided for search and seizure of goods subject to duty when concealed in a ship or vessel, and for search and seizure of goods subject to duty, on the issuance

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[3] 19 Howell's State Trials 1154 (1763).

[4] 19 Howell's State Trials 1030 (1765).

[5] Paxton's Case, Quincy's Mass. Rep. 51 (1761).

[6] Wakely v. Hart *et al.*, 6 Binney 316 (Pa., 1814).

[7] "The basic principle is this: search of the person is unlawful when the seizure of the body is a trespass and the purpose of the search is to discover grounds as yet unknown for arrest or accusation (Entick v. Carrington, *supra*). Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion. . . . The immunity is not from all search and seizure, but from search and seizure unreasonable in the light of common law traditions." Cardozo, *J.*, in People v. Chiagles, 237 N. Y. 193, 192 N. E. 583 (1923).

[8] Mr. Chief Justice Taft, in Carrol and Kiro v. U. S., 45 Sup. Ct. 280 (1925).

of a search warrant, when concealed in a house or building.[9] The framers of the amendments evidently did not regard a search and seizure without a search warrant for concealed dutiable goods, when made in a movable vessel, as unreasonable, and provided a different means of search for the same articles in a house or dwelling. This contemporaneous construction has persuasive force.

"Fishing expeditions," whether with or without warrants, to get evidence in order to charge a person with some offense have been condemned as unreasonable. *Boyd v. United States*[10] held, that "when the compelling a man to be a witness against himself is the very object of a search and seizure of his private papers, it is an unreasonable search and seizure within the meaning of the constitutional prohibition."[11] A man's house is his castle, and a search of a house without a warrant, whether for contraband property[12] or for private papers,[13] is unreasonable. "Search warrants may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but . . . they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken."[14] Stolen goods, burglar's tools, forged or counterfeit notes, implements of gambling, excisable articles, intoxicating liquor illegally possessed and implements for its

[9] 1 STAT. AT L. 29, sec. 24: "That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize and secure any such goods, wares or merchandise; and if they have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited."

Cf. 11 STAT. AT L. 178, sec. 3 (Search of Vehicles and Persons) and 22 STAT. AT L. 40 (Warrant to Search Dwelling House or Other Place) which continue this distinction in the enforcement of the collection of customs duties. The first was referred to and treated as operative in Cotzhausen v. Nazro, 107 U. S. 215 (1882).

[10] 116 U. S. 616 (1886).

[11] Black's American Constitutional Law, (2d ed.) 506.

[12] Liquor—Amos v. U. S., 255 U. S. 313 (1921).

[13] Contracts—Gouled v. U. S., 255 U. S. 298 (1921). Papers—Silverthorne Lumber Co. v. U. S., 251 U. S. 385 (1920).

[14] Gouled v. U. S., 255 U. S. 298 (1921).

manufacture, and lottery tickets are among the most important articles as to which searches and seizures, with warrants, have been sustained.[15]

In the recent case of *Carrol and Kiro v. United States*,[16] a further illustration of the validity of a search and seizure without a warrant is furnished. Carrol and Kiro, the defendants below, were introduced to several prohibition officers (the latter using fictitious names) on September 29, 1921, and agreed to sell the officers some whiskey; the defendants went in their automobile from the officers' apartment to their source of supply in East Grand Rapids, but soon returned without any whiskey. Defendants were observed in their car on the highway by the officers on October 6th. On December 15th, the officers observed them on the road from Detroit to Grand Rapids, followed them, ordered the car to be stopped, searched the car, discovered intoxicating liquor, and arrested the defendants.[17] The defendants were indicted for unlawfully transporting intoxicating liquor in violation of the National Prohibition Act.[18] The defendants objected to the use of the liquor seized as evidence, as the search made by the officers was unlawful.[19]

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[15] Boyd v. U. S., 116 U. S. 616 (1886); Commonwealth v. Dana, 2 Metc. 329 (Mass., 1841); Cooley, Constitutional Limitations, (7th ed.) 432.

[16] 45 Sup. Ct. 280 (1925).

[17] The officers acted under the National Prohibition Act, 41 STAT. AT L. 305, Title II, section 26: "When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof . . . "

Section 25 provides: "It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property." This section also provides for search warrants to search private dwellings under certain conditions.

[18] 41 STAT. AT L. 305, Title II, sec. 3.

[19] "Even assuming the invalidity of the search and seizure, is the evidence obtained by the officers as a result thereof nevertheless admissible at the trial of the defendants? Upon this question there exist two diverse lines of opinion. The one view is that evidence obtained by an unconstitutional seizure is admissible the same as any other evidence secured by illegal means, and the only remedy of the injured person is a civil or criminal action against the offending officer or official. . . . The opposing view makes the evidence inadmissible if obtained through an unreasonable search or seizure, . . . in order better, as it is assumed, to preserve inviolate the constitutional right." Stern and Gordon, *JJ.*, in Commonwealth v. Street and Street, 3 Pa. D. & C. 783 (1923). The Federal courts take the latter view. See also Hoyer v. State, 180 Wis. 407, 193 N. W. 89 (1923). The question therefore was squarely presented whether the search was lawful and valid.

The Supreme Court of the United States, per Taft, *C. J.* (McReynolds and Sutherland, *JJ.*, dissenting), held the search was lawful. "The true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid." [20] The court was helped in the formation of this rule by the contemporaneous exposition of the amendment by the First Congress, as mentioned above, and by the fact that only unreasonable searches are prohibited.[21] This rule does not allow every vehicle on the highway to be stopped and searched, but "the measure of legality of such a seizure is . . . that the seizing officer shall have reasonble or probable cause for believing that *the automobile* which he stops and seizes has contraband liquor therein which is being illegally transported." [22] Further, in disposing of the argument that the right to search should rise no higher than the right to arrest, and, as there was no right to arrest in this case without a warrant, that therefore the search was unlawful, the court said: "The right to search and the validity of the seizure are not dependent on the right to arrest: they are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." [23] The court came to the conclusion that on the facts as given above and from their judicial notice that the road, which the defendants were using, led from the Canadian border, a notorious place of rum-running, the officers had probable cause and were therefore justified in the search and seizure.[24]

At first blush, the rule announced by the court may appear too sweeping. It may be contended that it gives the officers of the government too much power to interfere with the liberty of the individual and his property by unreasonable searches and seizures. The support derived from the contemporaneous interpretation in the

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[20] Page 283.

[21] Page 283.

[22] Page 286.

[23] Page 287.

[24] The dissenting opinion was based on these grounds: 1. A criminal statute must be strictly construed and "shall discover . . . in act of transportation" cannot mean "shall have reasonable cause to suspect or believe that such transportation is being carried on;" 2. Unreasonableness depends on the means adopted and as the seizure followed an unlawful arrest, the seizure became unlawful; 3. The facts known by the officers were insufficient to create a reasonable belief that the defendants were transporting liquor contrary to law.

The majority opinion held that "discover" was not limited to that information derived from actually seeing the contraband, but adopted the broader definition given in Commonwealth v. Street and Street, 3 Pa. D. & C. 783 (1923)—"an uncovering, a revealing, or exploring."

customs duties act may be met by the argument that Congress has practically unchecked control over matters of taxation and revenue, in order to carry on the government properly and efficiently, but that the National Prohibition Act is a "police" statute, to which the same rule should not apply.[25] As to the argument that the search is directed at that which is contraband, in the course of transportation and subject to forfeiture or destruction, it may be objected that "this is the same specious reason given in colonial days in support of general warrants for search and seizure of smuggled goods, and loses sight of the right of security of persons and their possessions against searches and seizures and makes the thing sought for seizure the controlling idea." [26]

As a practical matter, it is very probable that the power given by this rule to the police may be abused and every automobile stopped, under the theory that the end justifies the means employed.[27] It is obvious that one law should not be broken in order to help enforce another. The probable cause may be "meagre." [28] Right to redress in the aggrieved citizen is usually difficult of proof and his recovery of damages is very improbable. On the other hand, to require an officer to get a search warrant for an automobile which he reasonably believes is being used in the illegal traffic would be inadequate. It would be as difficult to catch the speeding automobile used in the

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[25] Murray's Lessee, *et al.* v. Hoboken Land & Imp. Co., 18 How. 274 (U. S., 1855).

[26] Wiest, *J.*, in People v. Case, 220 Mich. 379, 190 N. W. 289 (1922). In this case, the sheriff searched every automobile on the grounds of a public fair for intoxicating liquor, and the defendant was arrested after liquor was found in his car. The court, by a vote of 5 to 3, upheld the search as not unreasonable. The quotation given above is from the dissenting opinion. In Hoyer v. State, 180 Wis. 407, 193 N. W. 89 (1923), an automobile was in a collision, which caused some of the bottles contained in the car to break, and the car was left at the side of the road; an officer later smelled the suspicious odor and searched the car to trace the odor to its source. Held, that this was an unreasonable search: "The situation presented to these officers at the time they entered the automobile and took its contents was one which, at the most, might have justified the issuance of a search warrant by a magistrate. The granting of such a writ, however, is a matter for judicial determination and not within the much more limited field of the discretion vested in executive or administrative officers."

[27] "It is not unreasonable for a prohibition enforcement officer to stop automobiles upon the public highway and search them for intoxicating liquors without a warrant, and *the finding of the liquor justifies the search.*" U. S. v. Bateman, 278 Fed. 231 (D. C., 1922).

"It is not and cannot be the law in criminal cases that an illegal arrest or search could be legalized by the finding of evidence that a crime had been committed, for a search or arrest illegal to begin with remains illegal and no injury should be allowed to flow to the defendant by reason of his submission to it." U. S. v. Rembert, 284 Fed. 996 (D. C., 1922).

[28] Cf. U. S. v. Rembert, 284 Fed. 996 (D. C., 1922).

transportation of liquor as for the hare to lose the race to the tortoise when the hare stayed awake and ran towards the goal. How wisely this rule will work and be worked remains to be seen.

H. W. S.

IS THE OPERATION OF A STREET RAILWAY BY A MUNICIPALITY THE EXERCISE OF A GOVERNMENTAL FUNCTION.—It is established law that municipal corporations possess a dual nature.[1] They perform some acts which are governmental in character and others which are private. When a city exercises the sovereignty delegated to it by the state, it acts in a governmental or sovereign capacity. When it exercises its corporate power, it acts in a private (also called ministerial or proprietary) capacity. In the first instance the city is regarded by the law as a sovereign; in the latter instance as a legal individual.

"Familiar examples of governmental duties are the duty of preserving the peace, and the protection of property from wrongdoers, the construction of highways, the protection of health, and the prevention of nuisances."[2] Thus the city acts in a governmental capacity in passing ordinances, in maintaining courts, in furnishing police and fire protection, and in building streets.[3] On the other hand the city acts in its corporate capacity in operating gas, water and electric light plants,[4] and in furnishing its citizens commodities such as ice, coal and liquor.

It is sometimes hard to draw a distinction between the two kinds of city powers, since it has been the tendency of the courts to enlarge the governmental function. The question arises most often in the law of torts. When the city acts as a sovereign, in a governmental act, it cannot be sued for the torts of its employees; but it is responsible, as any other legal individual, for the acts of its agents in the exercise of its private functions. The courts have been prone to relieve the city of liability in acts imposed by the state or done in a spirit of benevolence towards its residents, and so have been

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[1] Lloyd v. New York, 5 N. Y. 369, 374 (1851). 1 McQuillin, Municipal Corporations, sec. 87. Pond, Public Utilities, ch. II.

[2] Hart v. Bridgeport, Fed. Cas. No. 6149 (1876). The court said: "Execution of these duties is undertaken by the government because there is a universal obligation resting upon the government to protect all its citizens, and because the prevention of crime, the preservation of health, and the construction of means of inter-communication are benefits in which the whole community is alike and fully interested."

[3] See White, Negligence of Municipal Corporations, sec. 25, where cases are cited which show the extent to which courts have gone in defining a governmental act.

[4] For cases showing examples of private acts of municipalities in all states see Pond, Public Utilities, sec. 265.

forced to call many doubtful acts governmental in nature.[5] Again, the question arises when the federal government attempts to tax the employees of a city. The courts have called certain functions governmental to exempt them from such taxation. Probably the most recent occurrence of such an interpretation is in the case of *Frey v. Woodworth*.[6] In this case the federal district court came to the conclusion that the city of Detroit operated its municipal street car system as a part of its governmental function. Said the court: "The street car system of a modern city whether its cars are operated upon the surface, overhead, or underground, constitutes the veins and arteries of the city, necessary to its very life. Upon its proper functioning depends inevitably the efficiency of government in preserving the peace, protecting property and health, and preventing nuisances. Without it the city cannot exist. Without it the government cannot function in any of its essential respects."

If this eulogy to the modern street railway system could be concurred in, there is little doubt that the operation of street railways should be classed as a governmental act. But it loses force when compared with other decisions. It is doubtful if a railway system contributes so much to the prevention of crime as the electric lighting system of a city, or so much to health as the furnishing of pure water. Yet these functions are decidedly within the private powers of a city. In the case of *Illinois Trust and Savings Bank v. Arkansas City*[7] the court said: "In contracting for water works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens." This language has been adopted in a later federal case.[8] As a basis for these decisions, an earlier case had defined the private functions of a city as those which benefit the corporation, or give comfort to its citizens, "those things not exercised in the discharge of those general and recognized duties which are undertaken by the government."[9] So in the case of

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[5] But in the recent case of Fowler v. Cleveland, 100 Ohio 158, 126 N. E. 72 (1919) the court held the city liable for the negligence of a fire truck driver. The court said the city exercised its governmental function by a ministerial act. This doubtful opinion shows a reaction against the exemption of municipalities from tort liability. See 34 HARV. L. REV. 665; 5 CORNELL L. REV. 90.

[6] 2 Fed. (2d) 725 (D. C., 1924), where it was held that the salary of a motorman on the municipal street railway was exempt from the federal income tax.

[7] 76 Fed. 271 (C. C. A., 1896).

[8] Omaha Water Co. v. Omaha, 147 Fed. 1 (C. C. A., 1906).

[9] Hart v. Bridgeport, *supra*, note 2. Yet it need not be said that no new function of the state would be governmental. Fire protection by the state is a modern exercise of a function formerly private.

South Carolina v. United States,[10] it was held that the state system for dispensing liquor was the exercise of a proprietary power, even though it was strongly argued that it was an exercise of the state's police power. It seems ridiculous to say that a municipal railway system is not more to the advantage of the compact community which it serves than to the government at large.

The case of *Frey v. Woodworth* rejects several tests which other courts have used to distinguish municipal functions. In a leading case, *Bailey v. New York*,[11] the court said that a municipal waterworks was established "as well for the private emolument and advantage of the city as for the public good. The state, in its sovereign character, has no interest in it. The investment and profits are the private property of the city." The conclusion, invariably accepted, was that a public work maintained for private advantage and emolument was a private function of the city, though the public derived a common benefit from it. So it has been held that the city acts in its governmental capacity in maintaining parks, zoos, and incineration plants, since it gains no profit therefrom.[12] This is a doubtful test at best and has been questioned in recent decisions.[13] However, *Frey v. Woodworth* rejected it entirely, so that the opinion of the court, that the profit from the railway was wholly incidental, need not be questioned.[14] Nor would the court hear the argument that a mandatory act put upon the city by the state was a governmental function, while its permitted acts were private, although there is authority for this distinction.[15] Two recent Louisiana cases, *Jones v. New Orleans*,[16] and *Davis v. New Orleans Belt R. R.*,[17] have

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[10] 199 U. S. 437 (1905).

[11] 3 Hill 531 (N. Y., 1842).

[12] See McQuillin: Municipal Corporations, sec. 2672. It is generally held that city parks are maintained by the city in the exercise of its governmental capacity on the grounds of failure of profit. Comelisen v. Atlanta, 19 Ga. App. 436, 91 S. E. 415 (1917); see L. R. A. 1915C 435, note. The rule has been applied to a bathing beach, Nemet v. Kenosha, 169 Wis. 379, 172 N. W. 711 (1919); to street sweeping, Harris v. District of Columbia, 256 U. S. 650 (1921), in which there is a dissent; and to incineration, Snider v. City of High Point, 168 N. C. 608, 85 S. E. 15 (1915). These latter cases might be sustained on grounds of promoting health, but it seems that in the case of parks an analogy to ancient commons would be more plausible.

[13] *Supra*, note 5.

[14] However, the profit gained from the operation of a railway can hardly be called incidental, such as fees charged by a court. If the operation of the system were certainly a governmental function as it is in the case of ferries, then an incidental profit would change the character of the act. See U. S. v. King, *infra*, note 20. The opposite has been suggested in regard to maintaining parks for profit: see Comelisen v. Atlanta, *supra*, note 12.

[15] McQuillin, Municipal Corporations, sec. 2623.

[16] 143 La. 1073, 79 So. 865 (1918).

[17] 155 La. 504, 99 So. 419 (1923).

held that the operation of a belt railroad imposed on the city by statute was the exercise of a governmental function, while similar operation under a permissive power was a private business of the city. These cases might well have been considered in *Frey v. Woodworth,* but that court, in order to reach its decision, did not heed the usual test mentioned above, nor did it long consider the relation between a railway system and other public works. The true basis of its conclusion was the analogy it forced between street railways and highways.

The construction and maintenance of highways have always been within a city's governmental power because in early common law they were the King's highways, necessary for the passage of his troops.[18] Modern law has accepted this tradition and applied it to city streets without the need of showing the relation of highways to present-day government. Within the tradition were bridges and ferries, as extensions of highways.[19] In reaching its decision in *Frey v. Woodworth,* the court relied strongly on *United States v. King,*[20] a case which held that the municipal operation of ferries was a governmental function. The court decided that since the state's sovereign power over highways had been extended to ferries, it was logical to extend it to street railways. The court reasoned that the term "highway" was to be interpreted in the light of progress, and that the advance of civilization had extended the application of the word from path to road, to ferry, and finally to railway, so that today a railway was a common highway. But the analogy between ferries and railways will not hold, for the law as to ferries is an ancient tradition, and not a modern extension. Without this explanation, however, it is far easier to conceive of ferries as "floating highways" than to consider railways as common roadways.[21]

Cases discussing the relationship of railways to highways[22] have occurred especially in New York, seeking to determine if railway systems are matters of public use. In the oft-cited case of *Sun Printing and Publicity Association v. Mayor of New York,*[23] it was said that a railroad was a highway necessary for the common welfare of the people, and public in character. The opinion has been quoted to show that railways were ordinary highways. But

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[18] McQuillin, Municipal Corporations, sec. 227; 3 Dillon, Municipal Corporations, (5th ed.) secs. 1122, 1155.

[19] McQuillin, Municipal Corporations, sec. 406.

[20] 281 Fed. 686 (C. C. A., 1922). Ferries have been called "floating highways." Patterson v. Wollman, 5 N. D. 608, 67 N. W. 1040 (1896).

[21] The cases point out the distinction that ferries bear all the kinds of traffic found on the highways, while railways carry an exclusive class.

[22] 3 Dillon, Municipal Corporations, (5th ed.) sec. 1294; Nellis, Street Railways, (2d ed.) secs. 6, 24.

[23] 152 N. Y. 257, 46 N. E. 499 (1897).

it must be noticed that this case decided only that a street railway system was a matter of public use and that its construction was a city purpose. This does not aid the conclusion that a railway system is a governmental purpose,[24] for many proprietary acts of a municipality have been held public uses.[25] The case of *In re Board of Rapid Transit Commissioners*[26] considered the latter case, and held that a subway was built and belonged to the city as a proprietor, not as a sovereign.[27] As this was followed by *Linsheimer v. Underpinning and Foundation Company*,[28] there is no doubt that the New York courts would have reached a decision opposite to that of *Frey v. Woodworth*. The recent case of *Tobin v. Seattle*[29] is directly in point, deciding that the city of Seattle operates its municipal railway in its proprietary capacity, and owes its patrons the duties of a private corporation. In accord is *Davis v. New Orleans Belt R. R.*[30] In *Bird v. Detroit*,[31] it was held that authority to construct a highway was not authority to construct a street railway. It seems a far stretch of the imagination to interpret a statute authorizing construction and maintenance of a highway as power "to pave a road with two streaks of steel" and run street cars thereon. Yet some courts threaten to call a municipal street railway the King's, or Commonwealth's, highway.

It seems obvious that street railway systems must be classed with water works and electric lighting plants as proprietary func-

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[24] The court said that to leave the railway in private hands was "rather in accord with our American form of government which leaves trade and commerce to be carried on by individuel industry and enterprise."

[25] Linn v. Chambersburg, 160 Pa. 511, 28 Atl. 842 (1894), electric light plant; Jones v. Portland, 245 U. S. 217 (1917), fuel yard; Egan v. San Francisco, 165 Cal. 576, 133 Pac. 294 (1913), opera house. See Pond, Public Utilities, ch. IV.

[26] 197 N. Y. 81, 90 N. E. 456 (1909).

[27] The New York courts go to unusual lengths to show that a railway is not an ordinary use of a road and thus is additional servitude. Although this is not the accepted view, it does not weaken their distinction between governmental and private functions. [See 36 L. R. A. (N. S.) 677, 709]. Electric light poles and water pipes are not additional servitude: Palmer v. Larchmont Electric Co., 158 N. Y. 231, 52 N. E. 1092 (1899). It was well said that a city controlled street cars because it controlled the streets, not because they came within its governmental capacity: City of New York v. Brooklyn City R. R., 232 N. Y. 413, 134 N. E. 533 (1922).

[28] 178 App. Div. 495, 165 N. Y. Supp. 645 (1917).

[29] 127 Wash. 664, 221 Pac. 583 (1923).

[30] *Supra*, note 17.

[31] 148 Mich. 71, 111 N. W. 860 (1907). But even if it should be agreed, as argued in a dissenting opinion, that a railway was a necessary use of the street and that the city's power over streets should grow with its needs, it is not admitted that the exercise of such power would be governmental. See Davis v. New York, 14 N. Y. 506 (1856).

tions of a city. Careful search of the books has revealed no authority contrary to this view. Progress has made street railways public highways in the sense that they are for all the public to ride on, but it has not made them the peculiar concern of the state in its sovereign capacity. Without regard to the test of whether they are run for profit or by order of the state, it seems plain that they are not necessary to government. The state does not govern its people by means of its street railways. It is submitted that this, after all, should be the final test of a governmental function, and that the tendency to free municipal corporations from liability by calling all kinds of acts essential governmental functions should not be indulged.

W. F. C.

ERRONEOUS PRINCIPLES OF LAW AS BINDING IN SUBSEQUENT APPEALS IN THE SAME CASE.—When an appellate court reverses the decision of a trial court and sends the case back for a new trial, in accordance with the principles of law it has laid down for the future guidance of the trial court, it is generally stated that, if the issues remain the same, such principles of law govern the case in all its subsequent stages, and will not be reconsidered on a later appeal.[1] In short, these rulings are said to become the law of that case, binding upon the parties until the final conclusion of the particular litigation.[2]

That the law as thus laid down by the appellate court is, in the absence of extraordinary circumstances,[3] binding upon the trial court, admits of little question.[4] Any other holding would be fatal to our entire system of appeals, for if the trial court could with impunity disregard the superior judgment of an upper court, the purpose of the appeal, which is to correct errors, would be entirely frustrated.[5] A very recent illustration of the doctrine of the law of the case as applied to the trial court is afforded by the case of *Wil-*

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[1] Supervisors v. Kennicott, 94 U. S. 498 (1876); National Surety Co. v. Long, 85 Ark. 158, 107 S. W. 384 (1908); Buck Stove & Range Co. v. Vickers, 80 Kan. 29, 101 Pac. 668 (1909).

[2] 4 C. J., 1093.

[3] Thus it has been held that if the supreme court of the jurisdiction has, since the enunciation of the law by an intermediate appellate court, declared the law to be different, in another case, the trial court should follow the law as laid down by the supreme court. Barton v. Thompson, 56 Iowa 571 (1881). To hold otherwise would lead to most "illogical results." Lerulla v. Supreme Lodge, 223 Ill. 518, 79 N. E. 160 (1906). But see, *contra*, District of Col. v. Brewer, 32 App. (D. C.) 388 (1909).

[4] McClellan v. Crook, 7 Gill. 333 (Md., 1848); Dodge v. Gaylord, 53 Ind. 365 (1876).

[5] *Supra*, note 4.

liam Wrigley, Jr. Company v. L. P. Larson, Jr. Company,[6] where the Circuit Court of Appeals on a second appeal decided that the L. P. Larson, Jr. Company was entitled to an injunction to restrain further simulation of its product, and to an accounting of all profits realized from the illegal manufacture and sale of the simulated product by the Wrigley Company. The case was returned to the District Court for further proceedings, and there the Wrigley Company sought to question the mandate of the Circuit Court as regarded "all profits," on the ground that in deciding this the upper court went beyond what was necessary for the determination of the issue before it, and it was contended that only profits derived from common territory should be accounted for. On the principle of the law of the case, however, the District Court held that the decree was binding upon it in its entirety, even admitting the contentions advanced.

The effect of the principle of the law of the case, it is declared, is to preclude consideration on a second or third appeal of what was decided on the first appeal.[7] The desirability of bringing litigation to as speedy a close as possible is held to make necessary some rule of practice which obviates the possibility of recurrent discussion of decided points.[8] If the earlier ruling is sound in point of law there is little, if any, objection to such a rule of practice.[9] But suppose the law of the case as set forth on the first appeal by the upper court is of doubtful correctness, or admittedly erroneous. Can the appellate court reopen the question and correct the error, or is the rule of the law of the case such an inflexible one as to close discussion of the question forever, so that the court cannot rectify its mistake in order that the determination of the cause may then proceed on a sound basis?

The question as thus presented discloses the difference of opinion which has arisen in the courts due to two conflicting aims—one,

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[6] United States District Court for the Northern District of Illinois, Eastern Division; March 14, 1925.

[7] "The purpose of the rule is to cut off any inquiry at all into the rightfulness or wrongfulness thereof;" dissenting opinion in Brewer v. Browning, 115 Miss. 358, 376, 76 So. 267 (1917).

[8] Roberts v. Cooper, 20 How. 467 (U. S., 1857); Stacy v. Vermont Central Railroad Co., 32 Vt. 551 (1860); Strehlau v. John Schroeder Lumber Co., 152 Wis. 589, 142 N. W. 120 (1913).

[9] In many of the cases, it is submitted, the court on second appeal firmly felt that the prior ruling was correct, and employed the doctrine of the law of the case as a convenient method of obviating discussion of the question for the purpose of expediting the progress of the cause. See cases cited in note 1, *supra*. Evidence of this aspect of the doctrine is had in the case of Kiley v. Chicago, M. & St. P. Rwy. Co., 142 Wis. 154, 125 N. W. 464 (1910), where on second appeal the court held that the decision on the first appeal holding constitutional a statute which did away with the fellow-servant doctrine had become the law of the case; but the court then went on to give its reasons why the act was constitutional.

the desire to end litigation without undue delay, even at the cost of a decision based upon erroneous legal principles;[10] the other, to decide the issue justly, even if it is necessary to prolong the ultimate culmination by going back over trodden ground and starting anew, with unobjectionable principles of law as a guide.[11]

On principle, it would seem that the aim of our judicial system should be, not so much the expeditious handling of litigation, but rather the disposition of litigation by the rendition of just decisions, and it is submitted that where on a second appeal the appellate court is convinced that palpable error was committed on the first appeal in laying down the law of the case, the policy which is said to require such a rule should give way to the circumstances of the situation, in order that the proper law may then be declared.[12] In the language of Mr. Justice Holmes,[13] "In the absence of statute, the phrase 'law of the case,' as applied to the effect of previous orders on the action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."

While the modern tendency is undoubtedly the other way,[14] the weight of authority seems to be that what was decided on the first appeal, although unquestionably erroneous, is the law of the case and cannot be changed.[15] Most of the reasons advanced in the cases which hold this position, it is respectfully submitted, are entirely unsatisfactory. Invoking the rule of the law of the case under the circumstances here under consideration is sought to be justified on such grounds as that the matter is *res adjudicata*,[16] that

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[10] The thought that there must be some end to litigation has appeared especially in the California decisions; in fact it may be said that the doctrine of the law of the case as of binding force has become firmly fixed in that jurisdiction. Leese v. Clark, 20 Cal. 387 (1862); Allen v. Bryant, 155 Cal. 257, 100 Pac. 704 (1909). For a discussion and criticism of the California decisions see an article in 67 CENTRAL LAW JOURNAL 255.

[11] Railway Co. v. Merrill, 65 Kan. 436, 70 Pac. 358 (1902); Leckendorf v. Steinfeld, 225 U. S. 445 (1912); Brewer v. Browning, 115 Miss. 358, 76 So. 267 (1917). In Aubrey v. Almy, 4 Ohio 524 (1855), in answer to the argument that failure to adhere to the previous ruling of the court as the law of the case would result in delay in the decision of the case, the court said, "however inconvenient in practice this may be, we do not perceive how it can be avoided if we find the judgment to be erroneous."

[12] Henry v. The Atchison, Topeka & Sante Fe Rwy. Co., 83 Kan. 104, 109 Pac. 1005 (1910); Margold v. Bacon, 237 Mo. 496, 516, 141 S. W. 650 (1911), where it was said "an appellate court is a court for the correction of errors—its own as well as those of others." See also 2 Van Fleet, Former Adjudication, 1303.

[13] In Messenger v. Anderson, 225 U. S. 436, 444 (1912).

[14] 2 R. C. L. 226. In some jurisdictions the rule has been changed by statute. Mann v. Dorden, 171 Ala. 142, 54 So. 504 (1911); 4 C. J. 1099.

[15] *Supra*, note 2

[16] Stacy v. Vermont Central Railroad Co., *supra*, note 8; Cooper Union

the appellate court has no power to review its own decisions;[17] that the principle of *stare decisis* applies;[18] that the party in whose favor the prior decision operated has a vested right in the same of which he cannot be divested;[19] or that it would be unfair to the parties, who in the second trial shaped their evidence in accordance with the law as pronounced on the first appeal, to overturn those rules of law and make them proceed on a different basis.[20]

It is difficult to see how the matter can be considered as *res adjudicata*, no final judgment having been declared and the case still being in process of trial.[21] Also, if the decision of the court was incorrect, no reason should exist why it could not, at any time before the final determination of the cause, review the same and correct it.[22] As for the court being bound by the principle of *stare decisis* (which cannot apply, there being no final adjudication which can act as a precedent[23]), it is well settled that decisions based on bad law can, with propriety, be overruled in subsequent cases,[24] and the same should hold true, with greater force, where the bad law can be set aside before the case becomes a precedent. As to the arguments that there is a vested right, and that reversal would work a hardship on the parties, the fact that the court has made a mistake should not operate to give the party favored thereby a vested right in such mistake, especially where the litigation is not ended, so as to prevent the court from correcting itself;[25] and the hardship caused thereby deserves less consideration than the injustice which would be caused the party prejudiced by the mistake if judgment

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v. Laudy, 161 N. Y. 429, 55 N. E. 914 (1900); Bjorgo v. First National Bank of Emmons, 132 Minn. 273, 156 N. W. 277 (1916).

[17] Washington Bridge Co. v. Stewart, 44 U. S. 413 (1845); Leese v. Clark, *supra*, note 10.

[18] *Supra*, note 16.

[19] Taliaferro v. Barnett, 47 Ark. 359 (1886).

[20] Allen v. Bryant, *supra*, note 10.

[21] Keele v. Railway Co., 258 Mo. 62, 167 S. W. 433 (1914). Attention is directed to the remarks of Mr. Justice McKenna, in Southern Rwy. Co. v. Clift, 260 U. S. 316, 319 (1922), as to the distinction between the rule of the law of the case and *res adjudicata*: "The former ruling may have been followed as the law of the case but there is a difference between such adherence and *res judicata;* one directs discretion, the other supersedes it and compels judgment."

[22] Ry. Co. v. Merrill, *supra*, note 11.

[23] Even those courts which adhere to the doctrine agree that, if erroneous, the law as laid down is not to be considered a precedent in other cases. 4 C. J. 1096.

[24] WELL, RES ADJUDICATA AND STARE DECISIS, 545.

[25] School Directors v. City of Asheville, 137 N. C. 503, 50 S. E. 279 (1905); 18 COL. LAW REV. 79.

were permitted to go against him because of persistent adherence to it.[26]

In this connection, the recent case of *Gohman v. City of St. Bernard*[27] is interesting, in that one of the grounds upon which it seeks to support the doctrine of the law of the case as being a rule which is binding although the law as laid down is in point of fact erroneous is that of estoppel. In that case the plaintiff sued for damages caused by the adoption of an unreasonable grade in front of her property. From judgment against the defendant, an appeal was taken. The appellate court reversed the judgment for alleged error in the charge of the court, and remanded the case for a new trial with instructions to charge on the question of damages in a particular way. The trial court charged in the language of the appellate court as directed. The plaintiff having obtained a larger verdict on this trial, the city again appealed, and this time to a different intermediate appellate court, which, upon review, concluded that the charge as given was clearly incorrect, and certified the case to the supreme court of the state. That court held,[28] that, although the charge was admittedly erroneous, it had become the law of the case, and that the party prejudiced thereby, the city in this case, by its failure to prosecute error to the supreme court in the first instance and by its action in going to trial again on the basis of the law as laid down, had elected to be bound by such law and could not be heard now to set up its inaccuracy.

There is very strong authority to the effect that while the law of the case is binding on the court which announced it, if that court is an intermediate appellate court, it is not binding, if erroneous, on the court of final appeal.[29] The Ohio case, therefore, is directly opposed to this authority. It is further submitted that its view that the party prejudiced by the law as laid down has elected to adopt that law and is estopped from later attempts to overthrow it is untenable. It is incorrect to say that such a party has elected anything; he has merely submitted to the decree of the court. If the court later perceives it has made a mistake, there is no reason why it should not be rectified for the benefit of the aggrieved party. The objection to the idea of the court that if the party does not prosecute error to the supreme court he is later estopped is well ex-

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[26] *Supra*, note 22.

[27] 146 N. E. 291 (Ohio, 1924).

[28] There were three dissents in the case. The court ordered a new trial as the trial court had not given full effect to the decree of the appellate court on the first appeal, and hence the rule of the law of the case could not be invoked. 4 C. J. 1098. Hence, it is submitted, the extended remarks of the court in support of the doctrine are largely dicta.

[29] Freet v. American Electric Supply Co., 257 Ill. 248, 103 N. E. 552 (1913); 2 TEXAS L. REV. 361.

pressed in the dissenting opinion,[30] in the thought that this holding "would compel every litigant to prosecute error, directly or by cross-petition, in order to obtain, not the judgment of this court upon the whole case, but its views on every legal phase that may be presented upon the several trials. This the litigant need do for his self-protection. Such practice is not conducive to the speedy end of litigation."

It has been forcefully urged that if the rule of the law of the case is not made absolutely binding in its operation, an encouragement will be held forth to frequent appeals to influence the court to take a different view, or to speculate in change in the personnel of the court in the hope that the newly constituted tribunal may be more favorably disposed.[31] An illustration of this occurred in the case of *Johnson v. Cadillac Motor Co.*[32] On the first appeal the law was laid down that the defendant even though negligent was not liable for injuries caused to the plaintiff by a defectively constructed automobile, as it was not the immediate vendor of the plaintiff and there was no privity of contract. When the case came up again on a second appeal two of the three judges were new members, and had not sat when the first decision was rendered. On the authority of *MacPherson v. Buick Motor Company*,[33] it was held that the defendant was liable, on the doctrine of imminently dangerous articles, and the prior holding was held not to be binding as the law of the case, being considered clearly erroneous.

While this case does indicate the danger which results from too readily overturning the law as laid down, especially where there is strong doubt as to whether it is not correct,[34] it is submitted that the dangers of repeated appeals on this ground have been greatly exaggerated. In the first place the argument assumes that there will be a change in the court's personnel on the second appeal, which is not altogether a certainty; furthermore, there is no reason to believe that the second court will lightly disregard what has been declared as the law of the case. The efficacy of the rule of the law of the case should lie in the power it gives the appellate court on a second appeal to refuse to reconsider questions previously decided, where it is convinced those findings are good law. But it should go no further than that, even though prolongation of the litigation will result. In the leading case of *Hastings v. Foxworthy*,[35] on the fourth appeal, ten years after the case had commenced, a new trial

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[30] At page 303.
[31] *Supra*, note 8.
[32] 261 Fed. 878 (1919).
[33] 217 N. Y. 382, 111 N. E. 1050 (1916).
[34] 20 COL. L. REV. 612.
[35] 45 Neb. 676, 63 N. W. 955 (1895). See 34 L. R. A. 321, note.

was ordered over the objection of counsel that the law as laid down on a prior appeal, although erroneous, had become the law of the case and could not be departed from. Where the issue is between winding up the case expeditiously and deciding it on solid grounds of correct legal principles, the latter should prevail. Where error has occurred, the true rule for the appellate court should be not *stare decisis*, the law of the case, or the like, but *"fiat justitia ruat cœlum."* [38]

M. E. C.

FEDERAL HABEAS CORPUS AS A MEANS OF REVIEW OF STATE DECISIONS.—Federal review of the administration of criminal law by the states, by means of application to the Federal courts for a writ of *habeas corpus*, has been viewed with alarm as presenting a new method of delay in criminal prosecution, a new burden upon the Federal judiciary, and a new point of conflict between the dual sovereignties.

A recent district court case [1] shows that the limits of this jurisdiction are as yet obscurely known, and calls for a reconsideration of the two leading cases which opened this field, *Frank v. Mangum* [2] and *Moore v. Dempsey*.[3] In the former case, a prisoner convicted of murder in a state court, having exhausted all other remedies,[4] asked for a writ of *habeas corpus* on the ground that his confinement was a deprivation of liberty without due process of law and therefore in violation of the Constitution. His reasons were *first*, that the court and jury were under the influence of mob violence, and *second*, that he was not present at the rendering of the verdict. The supreme court of the state had held that this latter objection

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[38] Ellison v. Georgia Railroad Co., 87 Ga. 691, 13 S. E. 809 (1891), where the court observed that "some courts live by correcting the errors of others and adhering to their own."

[1] United States v. Ashe, 2 Fed. (2d) 735 (D. C., W. Dist. Pa., 1924).

[2] 237 U. S. 309 (1915). See Henry Schofield "Federal Courts and Mob Domination of State Courts: Leo Frank's Case," 10 ILL. L. REV. 479; and note, 28 HARV. L. REV. 793.

[3] 261 U. S. 86 (1923). See also 9 VA. L. REV. 556; 33 YALE L. JOUR. 82; 37 HARV. L. REV. 247.

[4] Writ of error refused by Supreme Court of Georgia; Frank v. State, 141 Ga. 243, 80 S. E. 1016 (1913); refusal of extraordinary motion for new trial affirmed; Frank v. State, 142 Ga. 617, 83 S. E. 233 (1914); refusal to grant motion to set aside verdict affirmed; Frank v. State, 142 Ga. 741, 83 S. E. 645 (1914); application for writ of error denied by U. S. Supreme Court; In the Matter of Leo Frank, 235 U. S. 694 (1914). As to the necessity for appeal before application for habeas corpus, cf. Egan v. Knewel, 298 Fed. 784, 789 (D. C., 1924): "It is idle to say that petitioner should be required to seek a review of the proceedings in the state court by writ of error upon a record that obviously could not sustain a judgment of conviction." This view, however, is not supported by authority.

was waived by a failure to present it on appeal.[5] The United States Supreme Court, on appeal from a dismissal of the writ on demurrer, held *first*, that there was not sufficient evidence of mob violence and *second*, that the doctrine of waiver was not contrary to due process. It is stated in the opinion that no writ of *habeas corpus* can issue if the jurisdiction of the trial court is perfect;[6] then the court goes on to discuss due process;[7] from this it might be inferred that proceedings contrary to due process, for that reason alone exceed the jurisdiction of the state trial court. Or the decision may be explained on the ground that in this case there are two questions which must be considered separately—is the relator held by virtue of proceedings which exceed the jurisdiction or power of the trial court, so that a writ of *habeas corpus* may issue; and, is the relator held and so deprived of liberty without due process of law, so that there is a Federal question and the writ may issue from the district court? Any holding beyond the jurisdiction of the court is a violation of due process,[8] but not every violation of due process deprives the court of jurisdiction.[9] The case of *Moore v. Dempsey*[10] presents a situation where the same facts which made out a case of undue process also made out a case of lack of jurisdiction. There, on appeal from a dismissal of the writ on demurrer, it was held that there was a sufficient showing of mob domination over the state trial which resulted in a murder conviction, to warrant an investigation by the district court.[11] It may be conceded that such domination may reach a point where, just as the actions of individuals are legally inoperative because of duress, so the court will no longer be in legal effect a court, when further proceedings will be *coram non judice*.[12] Accordingly, it seems that the Supreme Court has gone no

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[5] Frank v. State, 142 Ga. 741, 83 S. E. 645 (1914).

[6] Frank v. Mangum, 237 U. S. 309, at 326, 327.

[7] *Id.*, 327, *et seq.*

[8] Hannis Taylor, Due Process of Law, ch. VII (1917).

[9] Cf. McMicking v. Schields, 238 U. S. 99 (1915), where the court refused the writ because no jurisdictional objection was presented, without deciding whether or not there was any lack of due process. This case arose under the due process clause of the Organic Act of the Philippine Islands, but no reason is seen to distinguish it from a case arising in the states. Kepner v. U. S., 195 U. S. 100 (1904). And cf. *In re* Green, 134 U. S. 377 (1890).

[10] *Supra*, note 3. and see 7 MINN. L. REV. 513, 514. 'In the main, this case has been considered in its bearing on the constitutional question of whether trial by a mob-dominated tribunal is a deprivation of life or liberty without due process of law, rather than in its relation to the law of habeas corpus.

[11] The Federal court is authorized to investigate all facts, even extraneous to the record, bearing upon the illegality of the prisoner's detention. REV. STAT., sections 754-761.

[12] The Supreme Court in Moore v. Dempsey did not hold that such a point had been in fact reached; the demurrer admitted mob-domination. For

further than to hold a proceeding which was beyond the jurisdiction of the state court lacking in due process, and therefore sufficient to justify the issue of a writ of *habeas corpus* from a Federal court. The statute granting to the Federal courts the power to issue writs of *habeas corpus* does not suggest that lack of due process is to be ground for the issue of the writ, except as it furnishes a ground for Federal jurisdiction.[13] Under this view all state criminal trials in which any question of due process arose would be subject to review in the district courts. Such jurisdiction would approximate *habeas corpus* to a writ of error, and it is a stock phrase, repeated by the Supreme Court in both *Frank v. Mangum* and *Moore v. Dempsey* that *habeas corpus* "cannot be employed as a substitute for a writ of error."[14]

The case of *United States v. Ashe*[15] illustrates the error to which a misconception of these two cases may lead. The relator shot and killed a thug in alleged self-defense, and also shot and killed an officer in immediate pursuit. He was separately indicted for the two homicides, but tried for both at the same time and before the same jury. Verdicts of guilty of murder in the first and second degrees, respectively, were rendered. On appeal to the Supreme Court of Pennsylvania this double trial was held proper procedure under the law of Pennsylvania.[16] Then a writ of *habeas corpus* was granted by the Federal district court on the following inverted reasoning: this procedure was improper by the law of Pennsylvania; the law of Pennsylvania is the law of the land (as to this case), so that relator was deprived of liberty without due process of law;[17] the court was ousted of jurisdiction because and when it denied to relator due process of law. This offers a variety of error. *First,* even if there were hostile precedents[18] as to such a

mob domination as ground for new trial, see State v. Wilcox, 131 N. C. 707, 42 S. E. 536 (1902).

[13] "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he . . . is in custody in violation of the Constitution or of a law or treaty of the United States." REV. STAT., section 753. It will be noted that this is the language of restriction rather than of grant.

[14] See cases collected by Charles P. Williams, "Federal Habeas Corpus," 9 ST. LOUIS L. REV., 250, 260, n. 41.

[15] *Supra,* note 1. For a report of the propaganda for pardon in this case, and the opinion of the district judge of the evidence on which the conviction was based, see 57 CHICAGO LEGAL NEWS 75.

[16] Commonwealth v. Valotta, 279 Pa. 84, 123 Atl. 681 (1924).

[17] It is already settled that a trial for two offenses at the same time and before the same jury does not violate the due process clause if there is a community of transaction between the crimes. Pointer v. U. S., 151 U. S. 396 (1893); McElroy v. U. S., 164 U. S. 76 (1896). No consideration was given to the relation of these two homicides. The only reason advanced to support the contention that this was not a proper procedure was that it was not permissible under the law of Pennsylvania.

[18] There is strong dicta in Withers v. Commonwealth, 5 Serg. & R. 59

double trial in Pennsylvania, the very decision of the Pennsylvania Supreme Court establishes that practice as the law of the land.[19] *Second,* even admitting that the Supreme Court could err in Pennsylvania law, to say that the proceeding was therefore a violation of due process is to erect a Federal right guaranteeing that all criminal trials in the states shall be free from mistakes of law (as the Federal judge conceives it) on the part of the state judiciary. Up to this time the United States Supreme Court has been satisfied with the conduct of trials if the court has jurisdiction, and notice and opportunity for hearing are given to the parties.[20] The doctrine of this case is an innovation. It suggests a truly startling extension of Federal supervision.[21] *Third,* even if this procedure was in violation of due process, it does not necessarily follow that the court was ousted of jurisdiction.[22] A court does not lose jurisdiction by committing error.[23] Violation of due process is of interest not as justifying the issue of the writ, but as the foundation of Federal jurisdiction. To allow habeas corpus to be extended beyond its proper sphere to all cases involving due process would be a duplication of review, since writ of error and *certiorari* are already provided.[24] As already suggested, it presents a new method of delay in criminal prosecution, a new burden upon the Federal judiciary, and a new point of conflict between the dual sovereignties.

B. M.

(Pa., 1819), in support of the district court's contention, but the later case of Commonwealth v. Brown, 264 Pa. 85, 107 Atl. 676 (1919) allowed without discussion the trial of two homicides at the same time and before the same jury.

[19] "The law of the State or any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties." Gray, The Nature and Sources of the Law, 84 (1921).

[20] See Hannis Taylor, Due Process of Law, 574-577 (1917).

[21] Mere error of law by a state court has never been held a denial of due process. Kennard v. La., 92 U. S. 480 (1875); Arrowsmith v. Harmoning, 118 U. S. 194 (1885); Castillo v. McConnico, 168 U. S. 674 (1897); McDonald v. Oregon R. R. & Navigation Co., 233 U. S. 665 (1914).

[22] See discussion *ante.*

[23] *Ex parte* Harding, 120 U. S. 782 (1887); *In re* Green, 134 U. S. 377 (1890); Matter of Moran, 203 U. S. 105 (1906); McMicking v. Schields, *supra,* note 9.

[24] Cf. attitude of Filer v. Steele, 228 Fed. 242 (D. C., 1915), on application for habeas corpus as a last resort: "He was tried in a court of competent jurisdiction, and exhausted his legal remedies, not only in the trial court, but in the appellate court, where he was heard on the very question which forms the basis of this application. The judgment of the Supreme Court being adverse, he made three separate applications to the judges of the Supreme Court for a writ of error, which applications were denied. It must be presumed that, had his applications for a writ of error presented a case of deprivation of liberty without due process of law, such writ would have been awarded then."